

STATE OF MICHIGAN
IN THE SUPREME COURT

RICHARD COSTA AND CINDY COSTA,

Plaintiffs-Appellants,
Cross-Appellees,

Supreme Court No. 127334-35

Court of Appeals No. 247983, 248104

v

Wayne County Circuit
Court No. 02-202463-NH

COMMUNITY EMERGENCY MEDICAL
SERVICES, INC., DAVE HENSHAW, SCOTT
MEISTER, DONALD FARENGER, and LISA
M. SCHULTZ,

Defendants/Appellees,
Cross-Appellants.

127334-5

**AMICUS CURIAE BRIEF OF THE ATTORNEY GENERAL
IN SUPPORT OF DEFENDANTS-APPELLEES' POSITION**

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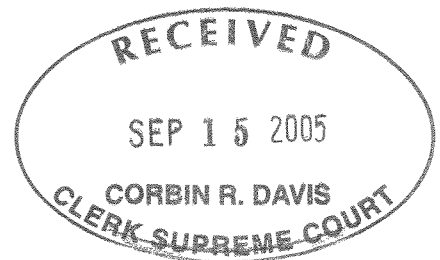


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INTRODUCTION

This Court has asked the parties to brief two issues: (1) whether entry of a default is among the remedies against a party who fails to file an affidavit of meritorious defense, as required by MCL 600.2912e, and if yes, under what circumstances such a remedy is mandatory; and, 2) the effect that reliance on the defense of governmental immunity has on the obligation to file an affidavit of meritorious defense under MCL 600.2912e.¹

The Attorney General requests amicus status to brief the Court on the second issue only. Any ruling of the Court as to the defense of governmental immunity will apply to the State in the handling of medical malpractice cases against its employees and medical facilities.

¹ *Costa v Comm Emergency Med Servs*, __ Mich __; 699 NW2d 305 (2005).

STATEMENT OF PROCEEDINGS AND FACTS

The Attorney General accepts the Statement of Facts in the brief filed by Defendants-Appellees.

ARGUMENT

- I. **Staying the defendant's affidavit of meritorious defense deadline until the court makes a determination as to the outcome of a governmental immunity defense serves the important policy justifications behind the doctrine of governmental immunity, and is consistent with the purpose of MCL 600.2912e.**

This Court has asked the parties to brief the issue of the effect of the defense of governmental immunity on the defendant's obligation to file an affidavit of meritorious defense under MCL 600.2912e. Section 2912e states that "defendant's attorney shall file, not later than 91 days after the plaintiff or the plaintiff's attorney files the affidavit required under section 2912d, an affidavit of meritorious defense."² The statute is silent, however, as to whether the 91-day deadline may be stayed pending resolution of the governmental immunity issue.

As a general rule, under the Governmental Tort Liability Act,³ a governmental entity is immune from tort liability for actions that accrue while it is engaged in the performance of a governmental function.⁴ This Court in *Ross v Consumer Power* redefined the application of statutory immunity to governmental entities, codified in MCL 691.1407(1).⁵ *Ross* established the basic principle that the immunity of governmental entities is broad while the exceptions are to be narrowly drawn.⁶ In so holding, this Court recognized the "clear legislative judgment" that public and private tortfeasors be treated differently.⁷

The United States Supreme Court and Michigan courts have recognized that the purpose of governmental immunity is to protect the governmental body, not only from liability, but from

² MCL 600.2912e.

³ MCL 691.1401 *et seq.*

⁴ *Rearden v Dep't of Mental Health*, 430 Mich 398; 424 NW2d 248 (1988) (citing MCL 691.1407; MSA 3.996(107)).

⁵ *Ross v Consumers Power Co (On Rehearing)*, 420 Mich 567; 363 NW2d 641 (1984).

⁶ *Ross*, 420 Mich at 618.

⁷ *Ross*, 420 Mich at 618.

the trial itself.⁸ Such a conclusion is consistent with one of the purposes of immunity, which is to avoid the time and expense of defending a case. The Michigan Court of Appeals has stated that "whenever a plaintiff alleges facts in avoidance of immunity, or when a defendant claims that immunity applies, the trial court should be obligated to evaluate the specific conduct alleged to determine whether a valid exception [to governmental immunity] exists."⁹ The Court of Appeals has further stated that "if a trial court must simply let a case go forward whenever the plaintiff claims that intentional torts are involved, immunity would be illusory."¹⁰

Therefore, a government defendant, whether the agency or an individual, should have the opportunity to see if plaintiff has pled a claim that warrants a defense of immunity prior to incurring the burdens associated with litigation. In the present case, allowing government defendants to raise the immunity defense while simultaneously requiring that they disrupt their duties and expend time and taxpayer resources preparing an affidavit of meritorious defense that may be unnecessary, would make the benefits of immunity truly illusory. Immunity is a defense that needs to be decided as early into the case as possible.

This urgency in first deciding a government agency's or employee's immunity under MCL 691.1407(1) or (2), is further evidenced by the change to MCR 7.203, that now provides an appeal of right on a trial court's denial of immunity to a governmental defendant and the automatic stay of the trial court proceeding while that appeal is pending.¹¹ To require a government defendant to comply with the requirements of § 2912e after raising the defense of immunity by filing a motion early into the case, but while the motion is pending at the trial court

⁸ *Walsh v Taylor*, 263 Mich App 618, 624; 689 NW2d 506 (2004) (citing *Mitchell v Forsyth*, 472 US 511, 526-527; 105 S Ct 2806; 86 L Ed 2d 411 (1985)).

⁹ *Walsh*, 263 Mich App at 624.

¹⁰ *Walsh*, 263 Mich App at 624.

¹¹ MCR 7.202(7)(a)(v); MCR 7.202(E)(4).

level, is contrary to the purpose of governmental immunity and the expedited appellate review accorded appeals from a trial court's denial of immunity.

This Court's decision to stay a defendant's affidavit of meritorious defense deadline pending the outcome of a governmental immunity defense would also be consistent with the purpose of the affidavit requirements for both plaintiffs and defendants in medical malpractice cases – to avoid frivolous medical malpractice claims, and identify valid claims and defenses meriting discovery.¹²

In short, the policies behind the Governmental Tort Liability Act and the medical malpractice statute would be served by this Court holding that a defendant's 91-day deadline to file an affidavit of meritorious defense is stayed pending the outcome of a governmental immunity question.

¹² See *Kowalski v Fiutowski*, 247 Mich App 156, 164; 635 NW2d 502 (2001) (citing *Vandenberg v Vandenberg*, 231 Mich App 497, 502; 586 NW2d 570 (1998)).

CONCLUSION

For the above-mentioned reasons, the Attorney General Michael A. Cox urges this Honorable Court to hold that a defendant's 91-day deadline to file an affidavit of meritorious defense in a medical malpractice suit, is stayed pending the outcome of the defendant's governmental immunity defense.

Respectfully submitted,

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